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Attorneys for Defendants
C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
 Litigation,

No. 2:15-MD-02641-DGC

DEFENDANTS' MOTION IN
***LIMINE* NO. 4 AND**
MEMORANDUM IN SUPPORT
REGARDING A PATIENT AT
DR. MUEHRCKE'S HOSPITAL

This Document Relates to:
 Debra Tinlin, et al. v. C. R. Bard, Inc., et al.
 CV-16-00263-PHX-DGC

(Assigned to the Honorable David G.
 Campbell)

(Oral Argument Requested)

During a recent deposition that Dr. Muehrcke gave in a state-court case, he offered testimony and opinions about a patient for whom he was a consulting physician. (Muehrcke Dep. Tr., 7:15-22, Oct. 18, 2018, attached as Exhibit A.) Dr. Muehrcke testified that the patient had a Bard filter where a strut had embolized to the heart and was causing cardiac tamponade. (*Id.* at 7:15 to 8:11.) Dr. Muehrcke testified that he wanted to remove the strut from the heart, but the patient's lung function was poor and she had signed a "do not resuscitate" order. (*Id.* at 8:17-24; 11:21 to 12:6.) The patient died, and Dr. Muehrcke testified that the cause of death was "tamponade and severe COPD." (*Id.* at 9:2-6; 11:9-10; 11:13 to 12:6.) Dr. Muehrcke testified that he thinks that the tamponade was caused by the filter strut. (*Id.* at 10:23 to 11:4.) No death caused by a filter strut in the heart has ever been reported to Bard concerning any of its IVC filters, however. For three reasons, Bard moves *in limine*¹ to exclude testimony or evidence about this patient.

1. Facts and opinions about the patient have never been properly disclosed.

As the Court outlined in CMO-8, Rule 26(a)(2)(B) requires "[f]ull and complete disclosures" of "the testimony the [expert] witness is expected to present during direct examination, together with the reasons therefor." (CMO No. 8, at 3 (citing Fed. R. Civ. Pro. 26 Advisory Committee Notes to the 1993 Amendments).) Nothing about the aforementioned patient, however, was disclosed in Dr. Muehrcke's Rule 26 Report in *Tinlin* (or any other Rule 26 Report or expert disclosure in any other case). Nor did Dr. Muehrcke provide any records or imaging concerning this patient in response to requests for production of documents as to all material that he relied on in reaching his opinions in *Tinlin*. (Not. of Taking Videotaped Dep. of Derek R. Muehrcke, 4 ¶ 2(b), Dec. 6, 2018, attached as Exhibit B.) Nor did Dr. Muehrcke testify during his *Tinlin* deposition about this patient.

As such, Bard is left only with Dr. Muehrcke's say-so—from a deposition in another case—about the patient without any meaningful way to challenge the facts

¹ Counsel for Defendants conferred with counsel for Plaintiff and this motion is opposed.

1 underpinning his opinions, or to challenge the opinions themselves. On such a critical
2 issue—where Dr. Muehrcke may tell the jury that patients like Ms. Tinlin are at risk of
3 death because of filter struts in the heart, and where he may tell the jury that he has seen
4 first-hand a patient die because of a Bard filter strut in the heart—Bard should be entitled
5 to a full exploration of the factual underpinnings of this extraordinary claim, especially
6 given that Bard has never received a report of a death from a filter strut in the heart.

7 Because the plaintiffs have not disclosed anything about Dr. Muehrcke’s patient as
8 part of his Rule 26 Report or in response to Bard’s document requests that accompanied
9 his deposition notice, Bard has not been afforded a full exploration of this issue ahead of
10 trial. As such, the Court should exclude any testimony or evidence about the patient.

11 2. Dr. Muehrcke’s opinions about the patient should be excluded under Rule 702.

12 Rule 702 requires that all expert opinions be “based on sufficient facts or data,”
13 “the product of reliable principles and methods,” and that the expert “reliably applied the
14 principles and methods to the facts of the case.” The plaintiffs cannot meet their burden
15 regarding Dr. Muehrcke’s opinions about this patient.²

16 Dr. Muehrcke provided no facts or data about the patient’s medical condition
17 beyond his recollection from a brief consult with the patient’s cardiologist several months
18 prior. Indeed, he suggested that the patient had a complicated medical history, which is
19 relevant to the reliability of his opinions about the cause of death, including that “she was
20 a sick lady,” that “[t]he pulmonologist wouldn’t clear her” for surgery, that the failure to
21 clear her was “very unusual,” and that she had a newly established do not resuscitate order
22 because “apparently she had suffered a lot before.”

23 Additionally, Dr. Muehrcke did not explain how his opinion that the filter strut
24 caused the patient’s death is the product of reliable principles and methods—he simply

25 _____
26 ² As discussed *supra*, Bard believes that any testimony about this patient is completely out
27 of bounds in *Tinlin* because the opinions were not disclosed as part of Dr. Muehrcke’s
28 Rule 26 Report in the case. Out of an abundance of caution, however, Bard is raising the
admissibility of the opinions in the *in limine* context to prevent extraordinary prejudice if
counsel references the patient during opening statements or elicits reference to the patient
during Dr. Muehrcke’s direct examination.

1 said that the tamponade caused the death. Dr. Muehrcke does not say whether he used a
2 differential diagnosis or some other process to reach his opinion. Because Dr. Muehrcke
3 does not identify any principle or method, there is no way to ascertain whether any such
4 principle or method is reliable or whether he even used a principle or method.

5 Finally, without establishing that his opinions are based on sufficient facts and data
6 and reliable principles and methods, Dr. Muehrcke cannot satisfy the final element of the
7 Rule 702 analysis that he “reliably applied the principle and methods to the facts of the
8 case.” In addition to this fatal shortcoming, Dr. Muehrcke provides no insight into how he
9 is able to rule out other issues in causing the patient’s death, such as respiratory distress
10 alone, any of the patient’s undisclosed “multiple medical problems,” and whether the
11 patient would have died even if the filter strut was not present in the heart given her
12 respiratory distress and do not resuscitate order. Indeed, no autopsy was performed on the
13 patient to establish a definitive cause of death, which underscores the importance of the
14 Rule 702 requirements and analysis.

15 For each of these reasons, Dr. Muehrcke’s opinions about his patient should be
16 inadmissible under Rule 702.

17 3. Testimony about the patient should be excluded on Rule 403 grounds.

18 Dr. Muehrcke currently has an unchecked ability to provide powerfully misleading
19 facts and opinions to the jury: “Filter struts in the heart can cause death, and I know
20 because I recently had a patient who was killed by a Bard filter strut in her heart.” And
21 with no discovery about Dr. Muehrcke’s claims, Bard has no way to meaningfully
22 challenge these unfairly prejudicial facts or opinions, or offer any expert of its own to
23 show that the statements are misleading. As such, the testimony should be excluded.

24 * * * *

25 For each of the foregoing reasons, the Court should grant Bard’s motion *in limine*
26 number 4.

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1 RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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